Supreme Court, U.S.
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No. 00-1045

IN THE
Supreme Court of the United States

TRW INC.,

Petitioner,

v.

ADELAIDE ANDREWS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY FOR THE PETITIONER

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REPLY FOR PETITIONER

The petition demonstrated that the Ninth Circuit's decision in this case creates a conflict among the circuits on an important and recurring issue. Since the filing of the petition, the Associated Credit Bureaus and the three nationwide credit reporting agencies have filed a brief *amicus curiae* to stress the importance of the question presented and urge this Court to grant certiorari. Moreover, nothing in the opposition casts doubt upon the appropriateness of granting certiorari in this case. To the contrary, the opposition highlights additional reasons why certiorari should be granted in this case.

1. Respondent does not dispute the petition's demonstration (Pet. at 8-11) that there is a square four-to-one conflict among the courts of appeals over the applicability of the discovery rule to the statute of limitations in Section 618 of the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq*. To the contrary, respondent contends that there is an even deeper conflict in principle among the lower courts.

According to respondent (Opp. at 27-28), the decision below is supported by a decision from the Fifth Circuit, *Hyde v. Hibernia Nat'l Bank*, 861 F.2d 446 (5th Cir. 1988). That is incorrect. In *Hyde*, the Fifth Circuit simply held that Section 618 does not start running until injury occurrs and liability arises, *see id.* at 449-50, which is perfectly consistent with the refusal in cases such as *Houghton* and *Rylewicz* to incorporate the discovery rule and thereby delay the running of the statute of limitations until injury is, or should be, discovered. However, if there were some conflict in the reasoning, that conflict would support granting, not denying, certiorari because it would show a broader conflict in principle underlying the conflicting holdings discussed in the petition.

Citing a recent district court decision from the Sixth Circuit, *McAnly v. Middleton & Reutlinger, P.S.C.*, 77 F. Supp. 2d 810, 814 (W.D. Ky. 1999), respondent also asserts that the current trend is to imply the discovery rule into FCRA, that the opposing *Houghton* line of cases is "already crumbling," and

that "[d]enying certiorari here would advance that process." Opp. at 29. Here again, respondent is incorrect. There is no judicial trend towards adoption of the discovery rule: although two years ago one district court in the Sixth Circuit found that Section 618 implicitly incorporated the discovery rule, three prior district courts in other circuits that have also yet to consider the issue rejected the rule.[1]

More importantly, respondent does not—and cannot—point to any evidence suggesting that the circuits rejecting the discovery rule will reconsider their position. To the contrary, cases cited in the petition show that the decisions of those circuits are being implemented.[2] As a consequence, to the extent that *McAnly* shows anything, it is that the conflict among the circuits is likely to deepen, not disappear, absent this Court's intervention.

Finally, there is no basis for respondent's claim that *denying* certiorari will help to resolve this conflict. Certainly, there is no reason to think that the courts of appeals will be prompted by a denial of certiorari in this case to reconsider their positions. As this Court has observed, "[i]t is well-settled that our decision to deny a petition for writ of certiorari does not in

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[1] *See McNamara vv. Guazzoni*, No. 98 CIV 4085 (HB), 1999 WL 322648, at *4 (S.D.N.Y. May 20, 1999); *Way v. Barr*, No. HAR 94-2519, 1995 WL 307525, at *2 (D. Md. May 15, 1995); *Edgar v. Reich*, 881 F. Supp. 83, 84-87 (D. Mass. 1995).

[2] *See Gill v. Kostroff*, No. 98-930-CIV-T-17A, 2000 WL 141258, at *3-*6 (M.D. Fla. Feb. 8, 2000); *Ben-Hur v. Equifax, Info. Serv., Inc.*, 976 F. Supp. 795, 801-02 (E.D. Wis. 1997); *Wilson v. Porter, Wright, Morris & Arthur*, 921 F. Supp. 758, 759-61 (S.D. Fla. 1995); *Batchelor v. First Nat'l Bank of Blue Island*, No. 92 C 5073, 1993 WL 22859, at *3 (N.D. Ill. Jan. 20, 1993).

any sense constitute a ruling on the merits of the case in which the writ is sought." *Bethley v. Louisiana*, 520 U.S. 1259 (1997); *see generally United States v. Carver*, 260 U.S. 482, 490 (1923). Thus, respondent's suggestion that the conflict among the circuits will go away without this Court's intervention is nothing more than wishful thinking.

2. Respondent does not—and cannot—seriously dispute that this case presents an important and recurring question worthy of this Court's review. The petition demonstrated (Pet. at 15-17) that credit reporting agencies maintain millions of records in unified national files and that the decision below will force them to expand their record retention policies, thereby imposing an enormous administrative burden upon the industry. Although respondent claims in a footnote that "record evidence" shows that credit reporting agencies could retain data "for many years at minimal costs," Opp. at 2 n.2, she does not cite to any such evidence. Nor does she otherwise contest the petition's demonstration of the importance of the question presented, which, as mentioned above, has been reinforced by the brief of *amicus curiae* the Associated Credit Bureaus, Inc. and the three nationwide credit bureaus. In short, the importance of the question presented is essentially unchallenged.

3. Respondent's primary argument in opposition to certiorari is that the misrepresentation exception in Section 618 is not a specialized discovery rule, but rather a codification of the principle of equitable estoppel. Opp. at 15-22. To the extent that there is any merit in this theory—which admittedly has been "overlooked by courts and commentators" (*id.* at 23 n.14) and appears to have been advanced for the first time anywhere in the opposition—it is a reason for granting, not denying, certiorari. If, as respondent asserts, a majority of courts of appeals to consider the question presented have not only erred, but also overlooked important distinctions between

tolling and accrual doctrines in doing so, the lower courts are plainly in need of guidance in this area.

In any event, respondent's novel interpretation of the misrepresentation exception in Section 618 is unpersuasive. *First*, this interpretation conflicts with the text of the statute. As respondent recognizes, equitable estoppel is a tolling doctrine which suspends the running of the limitations period. Opp. at 9-10; *see generally Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450-51 (7th Cir. 1990). The misrepresentation exception in Section 618 does not, however, stop the running of the statute of limitations: it starts a new two-year limitations period running. *See* 15 U.S.C. § 1681p (providing that, where there is a covered misrepresentation, "the action may be brought at any time within two years after discovery by the individual of the misrepresentation"). As accrual rules govern when statutes of limitations begin to run, *see, e.g.*, *Cada*, 920 F.2d at 450, the misrepresentation exception is clearly an accrual rule, not the codification of a tolling doctrine.

Even more fundamentally, the misrepresentation exception does not codify the equitable estoppel doctrine. In the statute of limitations context, equitable estoppel has four elements:

> (1) a false representation or concealment of a material fact with actual or constructive knowledge of the truth;
>
> (2) inability of the party asserting estoppel to know or discover the truth;
>
> (3) the false representation or concealment made with the intent that it be relied upon; and
>
> (4) the person to whom the representation or concealment was made thus suffering prejudice by his or her reliance.

II Calvin W. Corman, *Limitation of Actions* § 9.1, at 28-29 (1991). The misrepresentation exception does not, however, contain anything even remotely resembling the third element's scienter requirement or the final element's requirement of

reliance. Thus, the misrepresentation exception does not codify the equitable estoppel doctrine either in substance or in effect.

Second, plaintiffs' interpretation makes little sense. By the time that FCRA was enacted in 1970, it was already well-settled that the equitable estoppel doctrine presumptively applies to express statutes of limitation such as Section 618. *See, e.g., Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 234 (1959); *see generally* II Corman, *Limitation of Actions* § 9.1, at 31. Consequently, Congress had no need to codify the equitable estoppel doctrine in order to ensure its application.

Recognizing this problem, respondent suggests that Congress codified the equitable estoppel doctrine because Section 618 is jurisdictional in nature and therefore precludes the application of any tolling doctrines. Opp. at 17 n.10. Respondent fails, however, to offer any reason why Congress would have made Section 618 jurisdictional. FCRA is a consumer protection statute, not a statute authorizing suit against the federal government, and it is therefore unlikely that Congress wanted to make the statute of limitations barring consumer claims jurisdictional in nature and thereby prevent defendants from waiving the limitations period. Thus, while creative, respondent's claim that Section 618 is jurisdictional, like its broader theory that the statute codifies the equitable estoppel doctrine, is unpersuasive.

Third, respondent's equitable estoppel theory does not prove that Section 618 implicitly incorporates the discovery rule. The petition demonstrated that, when Congress carves out an express exception to a statute, additional, unenumerated exceptions cannot be implied absent clear evidence of Congress' intent to do so. Pet. at 12. It also demonstrated that this principle applies with special force here because implying a general discovery exception into the statute of limitations would render the misrepresentation exception superfluous. *Id.* Plaintiffs' theory answers this second point by giving the

misrepresentation exception (some) meaning independent of the discovery rule. The theory does not, however, in any way undermine petitioner's first argument that Congress would have explicitly referred to the discovery rule had it intended to incorporate the rule into Section 618.

To the contrary, respondent's theory reinforces this argument. As respondent's own authority acknowledges, if Section 618 really is jurisdictional, it "must be strictly construed." *Hardin v. City Title & Escrow Co.*, 797 F.2d 1037, 1040 (D.C. Cir. 1986). Consequently, if respondent's theory is correct and Section 618 is jurisdictional, the misrepresentation exception must be interpreted to preclude implicit accrual rules and tolling doctrines. After all, if Congress were concerned enough with the running of the statute of limitations to provide a special rule for the admittedly rare situations in which (i) a reporting agency willfully misrepresents information concerning its liability to a consumer who (ii) already has discovered that liability and (iii) the consumer refrains from bringing suit in reliance upon that misrepresentation, it surely would have thought to provide for a discovery rule that would apply in many, if not most, situations. As a consequence, here again, respondent's argument undermines her position.

4. Respondent asserts that petitioner and the authority on which it relied has improperly interpreted Section 618 to be a statute of repose rather than a statute of limitation. Opp. at 20, 22-25. This is a strawman. Neither the petition nor any of the court of appeals cases rejecting the discovery rule refer to statutes of repose. Moreover, contrary to plaintiffs' intimation, a statute of limitations does not by definition incorporate the discovery rule. As one of respondent's own authorities recognizes, "[g]enerally, . . . the statute of limitation begins to run[] at the time of the occurrence of a judicially recognizable injury or event constituting a breach of duty . . . even though

the plaintiff is unaware of the accrual of his or her cause of action." II Corman, *Limitations of Actions* § 11.1, at 134.

Respondent also errs in asserting that the discovery rule has been consistently implied into federal statutes of limitations for at least 170 years. Opp. at 10-15. In fact, the general discovery rule did not begin to develop until the 1950s. *See* II Corman, *Limitation on Actions* § 11.2.1, at 136-39. The decisions cited by respondent deal instead with the specialized rule for the accrual of fraud claims. *See Amy v. City of Watertown*, 130 U.S. 320, 324 (1889); *Bailey v. Glover*, 88 U.S. (21 Wall) 342, 349-50 (1874); *Willison v. Watkins*, 28 U.S. (3 Pet.) 43 (1830). Those cases are, however, clearly inapposite because there was no fraud, whether actual or constructive, here. Respondent's claim is that petitioner improperly disclosed information to a third party, not that petitioner made misrepresentations or even omitted to make any required representations to her.

5. Although respondent does not directly dispute the petition's demonstration (Pet. at 17) that this case is a good vehicle for addressing the broader issue of the applicability of the discovery rule to federal statutes of limitations, she does repeatedly assert that her claims did not accrue until she suffered financial injury as a result of the improper disclosure of her credit reports. Opp. at 4, 9 n.5, 15, 19. Respondent did not, however, advance this factual argument below -- and with good reason. It is well-settled that a cause of action may be based upon an invasion of privacy, damages to reputation, or other injury even in the absence of any financial loss. *See, e.g., Fischl v. General Motors Acceptance Corp.*, 708 F.2d 143, 151 (5th Cir. 1983) ("Even where no pecuniary or out-of pocket loss has been shown, the FCRA permits recovery for humiliation and mental distress, as well as for injury to one's reputation and creditworthiness.") (citations omitted). Thus, the timing of respondent's financial injury does not in any way undermine the petition's demonstration that this case is a good

vehicle for resolving the important and recurring question presented by this case or the broader questions implicated by respondent's arguments.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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